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No. 89-1419

In The

Supreme Court of the United States

October Term, 1989

HALIFAX HOSPITAL MEDICAL CENTER,

Petitioner,

v.

RICHARD A. BOLT, and
RICHARD A. BOLT, M.D., P.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether the conclusion of the court of appeals that sufficient evidence existed to implicate a public hospital in a horizontal anticompetitive scheme that was not the foreseeable result of its enabling legislation in effect in 1981 and 1982 warrants further review by this Court.

2. Whether the Court should now settle a narrow question of law governing the capacity of a hospital and its medical staff to conspire under the Sherman Act in the absence of extensive and irreconcilable conflict among the courts of appeals.

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ADDITIONAL STATUTES INVOLVED

1979 Fla. Laws Ch. 79-577:

Section 3: The district shall have all the powers of a body corporate, including the power to sue and be sued, to contract and be contracted with, to adopt and use a common seal, to acquire, purchase, hold, lease and convey such real and personal property as may be proper or expedient to carry out the purposes of this act, to appoint and employ an executive director or administrator, chief surgeon, and such other agents and employees as may be advisable, or to borrow money and issue notes, bonds, and other evidences of indebtedness to carry out the provisions of this act.

STATEMENT OF THE CASE

This case was commenced in 1982 when Respondent Richard A. Bolt (*"Dr. Bolt"*) filed a multi-count complaint against three Daytona Beach, Florida, hospitals, including Petitioner Halifax Hospital Medical Center (*"Halifax"*), and certain members of their medical staffs. Dr. Bolt alleged a horizontal, community-wide conspiracy in restraint of trade against these Defendants. Dr. Bolt also alleged separate conspiracies between Halifax and members of its medical staff and a second hospital and its staff. Each of Dr. Bolt's antitrust claims was premised on conduct that occurred in 1981 and 1982 in connection with the sequential denial of his requests for the renewal of staff privileges as a surgeon at each of the three hospitals.

The district court limited the 1984 jury trial to one threshold issue – the existence of concerted conduct, an essential element of Dr. Bolt's antitrust claims. The district court excluded some of Dr. Bolt's most probative evidence and proceeded to direct a verdict in favor of the Defendants. On August 8, 1988, a panel of the court of appeals reversed the district court. *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273 (11th Cir. 1988) (*"Bolt I"*). The Eleventh Circuit subsequently vacated the original panel opinion and *sua sponte* ordered rehearing *en banc* on the state action immunity aspect of the decision. *Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233 (11th Cir. 1988) (*"Bolt II"*). At oral argument before the full court, Halifax and the other appellees formally waived any claim that they were immune from antitrust liability under the state action exemption. *Bolt v. Halifax Hosp. Medical Center*, 874 F.2d 755, 756 (11th Cir. 1989) (*en banc*) (*"Bolt III"*). The *en*

banc court vacated the state action portion of the opinion and reinstated the balance. On January 9, 1990, the panel rendered a final consolidated opinion in light of the full court's disposition of the case. *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990) (*"Bolt IV"*).

Despite Halifax's waiver of its state action exemption before the full court of appeals, the second panel opinion nonetheless addressed two state action issues Halifax belatedly injected into the appeal. *See Bolt IV*, 891 F.2d at 818, n.12. The lower court first rejected Halifax's novel argument that it was a state agency acting as sovereign. *Id.* at 824. The court of appeals then performed a straightforward analysis under *Hallie v. Eau Claire*, 471 U.S. 34 (1985), and concluded that Halifax's involvement in the anticompetitive scheme in 1981 and 1982 was not undertaken pursuant to any clearly expressed state policy. *Id.* at 824-25. Nor was Halifax's conduct the foreseeable result of any legislative grant of power. *Id.* The court of appeals therefore rejected Halifax's new state action arguments. The lower court also found that the evidence that was admitted or proffered was sufficient to go to the jury on the issue of whether Halifax and two members of its medical staff participated in a conspiracy in restraint of trade.

Relying on *Weiss v. York Hospital*, 745 F.2d 786, 816 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the lower court also concluded that members of a hospital's medical staff have the capacity to conspire *inter se*. *Bolt IV*, 891 F.2d at 819. The court took this reasoning one step further and held that a hospital is also capable of conspiring with the members of its medical staff. *Id.*

The lower court denied Halifax's motion for a stay of mandate pending the submission of a petition for writ of certiorari to this Court. On March 12, 1990, Justice Kennedy denied Halifax's motion for a stay of enforcement of judgment. While Halifax's petition is pending, the parties anticipate further proceedings in the district court, including the scheduling of a new jury trial pursuant to the mandate of the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals performed a straightforward and uncontroversial analysis of the state action question under the standard enunciated in *Hallie v. Eau Claire*, 471 U.S. 34 (1985). The only grant of legislative authority to Halifax regarding the peer review process was a general edict that delegated to Halifax "all the powers of a body corporate" including the nonspecific power to appoint "such other agents and employees as may be advisable." 1979 Fla. Laws Ch. 79-577, §3. The lower court correctly held that Halifax's participation in this particular anticompetitive scheme in 1981 and 1982 was not undertaken pursuant to a "clearly expressed state policy" and was, in fact, contrary to state policy. The decision below is entirely consistent, if not compelled, by the decisions of this Court and does not truly conflict with the decisions of any other court of appeals. In any event, the potential impact of the decision below on similar cases is limited by subsequent legislative developments, such as the Local Government Antitrust Act of 1984, §3, 15 U.S.C. §35 (1988), as well as the unique facts and procedural history of this case. There is no convincing reason for this Court

to review the court of appeals' disposition of the state action issue.

Nor is there any reason for the Court to intercede at this point in the development by the courts of appeals of the law regarding the capacity of a hospital to conspire with members of its medical staff. The "conflict" that Halifax posits is weak at best. The very decision on which Halifax builds its case for certiorari is not entirely consistent with its argument. In *Weiss v. York Hospital*, 745 F.2d 786, 816 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the Court of Appeals for the Third Circuit held that members of a hospital's medical staff had the legal capacity to conspire among themselves for purposes of the antitrust laws. The Eleventh Circuit followed this aspect of *Weiss* and Halifax does not challenge that part of the decision in the Petition. Moreover, the recent trend developing in the lower courts is in the direction of the Eleventh Circuit's resolution of the question regarding the legal capacity of a hospital to conspire with its medical staff. The lower court's disposition of this issue is also consistent with analogous decisions involving combinations of physicians who have the opportunity to act in an anticompetitive manner. In the wake of the recently-enacted Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988), the "severe consequences in the health care industry" that Halifax hypothesizes are mythical. Such policy concerns are properly addressed to Congress in any event. *See Patrick v. Burget*, ___ U.S. ___, ___, 108 S.Ct. 1658, 1665 n.8 (1988).

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. The State Action Issue

Halifax substantially overstates its case for certiorari on the state action question. The plain wording of the Eleventh Circuit's opinion negates Halifax's interpretation of the decision as the promulgation of a general "bad faith" or "bad motive" exception to the state action doctrine. The court of appeals did nothing more than objectively apply the standard adopted in *Hallie v. Eau Claire,* 471 U.S. 34 (1985), and its progeny to the challenged anticompetitive conduct and determine that there was no "clearly expressed state policy" that authorized or sanctioned it. This Court held in *Hallie v. Eau Claire* that a municipality is entitled to the protection of the state action exemption only where it is engaging in anticompetitive conduct pursuant to a "clearly expressed state policy." 471 U.S. at 40. Halifax argued below that it is the equivalent of a municipality and that its conduct was therefore exempt from antitrust scrutiny under *Hallie v. Eau Claire.* The court of appeals agreed that Halifax was similar to a Florida municipality and tested Halifax's actions under *Hallie v. Eau Claire.* The lower court nevertheless concluded that Halifax failed to demonstrate that it engaged in anticompetitive conduct pursuant to a clearly articulated state policy. *Bolt IV,* 891 F.2d at 825.

The narrowness of the court of appeals' ruling on this point cannot be over-emphasized. When the Eleventh Circuit considered the state action implications of this case *en banc,* Halifax eventually withdrew its claim that it was immune from antitrust liability under the state action exemption:

> In oral argument before the *en banc* court, the appellee hospitals and their medical staffs formally withdrew any claim that they were immune from antitrust liability under the state action exemption. Thus, whether or not the defendants are entitled to immunity under *Parker [v. Brown*, 317 U.S. 341 (1943)]'s state action exemption, they now have clearly waived that immunity in this case.

Bolt III, 874 F.2d at 756. The second panel opinion construed the previous withdrawal of the state action defense as a waiver by Halifax of its *Parker* defense as a private party. *Bolt IV*, 891 F.2d at 823 n.22. Accordingly, the lower court's state action analysis did not turn on the general statutory and regulatory framework governing peer review that was in effect in Florida in 1981 and 1982. Indeed, because of Halifax's previous conduct in the appeal, the court in *Bolt IV* did not cite or discuss the statutory and regulatory laws of general application to the medical staff credentialing process as a possible source of clearly articulated state policy. The lower court's decision was based solely on the provisions of Halifax's enabling legislation. *See* 891 F.2d at 825.

There is only one provision of Halifax's statutory charter that could even arguably support a clearly expressed state policy to displace competition in the hiring of physicians with regulation or monopoly public service. Section 3 of the enabling legislation of Halifax provides in its entirety:

> The district shall have all the powers of a body corporate, including the power to sue and be sued, to contract and be contracted with, to adopt and use a common seal, to acquire, purchase, hold, lease and convey such real and

> personal property as may be proper or expedient to carry out the purposes of this act, *to appoint and employ* an executive director or administrator, chief surgeon, and *such other agents and employees as may be advisable,* or to borrow money and issue notes, bonds, and other evidences of indebtedness to carry out the provisions of this act.

1979 Fla. Laws Ch. 79-577, §3 (emphasis added). It seems self-evident that no intent to authorize anticompetitive conduct in the selection of staff physicians can be inferred from this nonspecific but routine grant of power to a newly-created body corporate.[1] It is even more far-fetched to read into this provision a "clear expression of state policy" that necessarily envisioned that Halifax would participate in a horizontal combination and restraint of trade with other area hospitals. As the lower court also correctly noted, Halifax was required by its enabling legislation to "act in a manner consistent with

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[1] Ironically, a finding of state action immunity based on Halifax's over-generalized enabling legislation would dangerously erode the state action doctrine in the opposite direction of Halifax's contention. Such a conclusion would be overly deferential to the States. The Court has expressly cautioned against this result:

> Acceptance of such a proposition – that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances – would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 (1982), If anything, Halifax's nebulous statutory charter is less explicit than Boulder's home rule charter.

the 'public good'." *Bolt IV*, 891 F.2d at 825, *citing* 1979 Fla. Laws Ch. 79-577, §5.

Thus, Halifax's contention that the decision below conflicts with the decisions of other courts of appeals because it purportedly creates a "conspiracy" exception to the state action doctrine is both misguided and unwarranted. The conclusion by the court of appeals in this case was based on a precise analysis and does not support the proposition that it necessarily created a general and far-reaching "conspiracy" exception to the state action doctrine. Halifax is not entitled to immunity from the antitrust laws if it conspired with its medical staff and conspired with other hospitals because such conduct was unauthorized and unforeseeable under its enabling legislation in effect in 1981 and 1982. In addition, such conduct, which the Eleventh Circuit found was amply supported by the evidence admitted and proffered during the trial, was obviously inconsistent with the "public good" that Halifax was statutorily charged with upholding.

Additionally, the cases on which Halifax premises the existence of a conflict do not actually support its position. The opinions of the courts of appeals for the Third, Sixth and Ninth Circuits, which Halifax cites for the proposition that a "conspiracy" exception to the state action doctrine has or should be rejected, cannot be read that broadly. In *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 489 (1988), *citing Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985), the Court of Appeals for the Ninth Circuit held merely that the availability of state action immunity "does not depend on the subjective motivations of the

individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it." The Ninth Circuit in *Boone* upheld a state action defense on a finding that the actions of the city and redevelopment agency were taken pursuant to express state policy and were contemplated by the statutory scheme. *Id; accord Consolidated Tel. Cable Serv., Inc. v. City of Frankfurt*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1537 (1989); *Hancock Indus. v. Schaeffer*, 811 F.2d 225 (3rd Cir. 1987). The abstract holding that a state actor's subjective motivations are irrelevant in determining state action immunity simply does not equate to an unequivocal rejection of a conspiracy exception. Furthermore, there is no irreconcilable inconsistency between these opinions and the decision below. The Eleventh Circuit here did not inquire into nor rely on any finding that the medical staffs or the hospitals acted in subjective bad faith. The court of appeals merely tested Halifax's objective conduct under the principles of the state action doctrine articulated by this Court in *Hallie v. Eau Claire* and its progeny and held that under these standards, Halifax was not entitled to immunity under the antitrust laws. There is no genuine conflict between these decisions which would warrant certiorari review by this Court.

The lack of true inconsistency among the courts of appeals on this point is further underscored by this Court's own precedent. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975), the Court refused to accord state action immunity when the Virginia Bar "voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim that it is beyond

the reach of the Sherman Act." (Footnote omitted). Analogously, in *Fisher v. City of Berkeley*, 475 U.S. 260, 269-70 (1986), the Court recognized the possibility of a conspiracy exception for private actors who subvert or manipulate a government program for their own anticompetitive ends. Halifax cites no decision from a court of appeals that has distinguished or limited *Goldfarb* while also unequivocally and directly rejecting a "conspiracy exception" to the state action doctrine.

Finally, Halifax's argument that the Eleventh Circuit's decision is the "death knell" of state action immunity is unwarranted hyperbole. Halifax posits that a "conspiracy" exception would swallow the rule because a clever plaintiff could subvert the state action doctrine by expediently alleging the existence of a conspiracy. This apprehension is unfounded. It conveniently overlooks the fact that much more than allegations support the court of appeals' opinion. The lower court found sufficient evidence to establish a *prima facie* case that Halifax and at least two members of its medical staff participated in a conspiracy to rid the medical community of Dr. Bolt. Moreover, Rule 11, Fed.R.Civ.P. ought to function as a safeguard to prevent unsupported accusations of conspiracy from becoming commonplace. Halifax's assertion that the lower court's opinion will drastically affect how public bodies formulate their future conduct is equally disingenuous. Recent intervening congressional legislation ensures that the Eleventh Circuit's decision should not significantly impinge on the manner by which public entities and public hospitals conduct their affairs. The Local Government Antitrust Act of 1984, §3, 15 U.S.C. §35

(1988), enacted after this case was commenced, immunizes most public bodies from antitrust damages. Moreover, public hospitals such as Halifax now have even greater statutory protection by virtue of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988). In sum, the jurisprudential impact of the decision below is likely to be limited because of the intervening legislative developments and the unique facts of the case. Acceptance of this case for review would directly affect only the immediate parties to the proceeding.

B. The Conspiracy Issue

There is no extensive conflict between the lower courts of appeals on the narrow legal question of whether a hospital may legally conspire with its medical staff under §1 of the Sherman Act. The court of appeals in the decision below examined the capacity of the medical staff to conspire both *inter se* and with the hospital. The lower court first agreed with *Weiss v. York Hospital*, 745 F.2d 786, 816 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), and followed its holding that members of a hospital's medical staff are fully capable of entering into a conspiracy in restraint of trade among themselves:

> We perceive no basis, however, for holding that the members of a medical staff are legally incapable of conspiring with one another. Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians.

Bolt IV, 891 F.2d at 819. Taking this analysis one step further, the Eleventh Circuit then logically concluded that

there was no principled reason for holding that a hospital is legally incapable of conspiring with members of its medical staff. *Id.* Although the court disagreed with *Weiss* on this one point, this partial conflict is hardly the basis for the exercise of certiorari review.

There has not yet developed an extensive, hotly-debated and deep conflict among the courts of appeals on this technical and limited legal question. By all appearances, the conflict may well disappear on its own as a result of future decisions in the various courts of appeals. The trend is definitely away from the talismanic approach of *Weiss*. *See Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988). As the Eleventh Circuit acknowledged, *Bolt IV*, 891 F.2d at 819, this part of the decision below has already received favorable commentary from noted authors in the health care field. Blumstein & Sloan, "Antitrust and Hospital Peer Review," Law & Contemp. Probs., Spring 1988, at 7, 52-53. There is no urgent need for the Court to step in and short circuit the development of the law on this narrow question in the courts of appeals.

Other ongoing developments in related areas of health care antitrust jurisprudence are creating precedent that should encourage the adoption of the Eleventh Circuit's analysis and the rejection of the *Weiss* holding on this point. For example, there is a line of authority governing antitrust liability for physician-controlled health care plans that have the ancillary effect of fixing prices or displacing competition. Liability under this precedent turns on the extent to which physicians actually control the terms of the plan. *See, e.g., Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332, 352-53 (1982) (maximum fee

schedule drawn up for plan by physician members of medical society condemned; "Even if a fee schedule is desirable, it is not necessary that doctors do the price fixing."); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 140 (1989) (general rule is that "health care plans may reimburse members and nonmembers differently, both in price and manner, so long as physicians (or the relevant group of competitive providers) do not control the health care plan"; evidence of effective control by physicians precluded summary judgment); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pa.*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (effective control of plan by dentists not shown); *Royal Drug Co. v. Group Life and Health Ins.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (same); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 480-81 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (challenged plans were mere "agents of their member physicians" and were in substance combinations of physicians). These cases illustrate one central point. Under the Sherman Act, courts will carefully examine arrangements in which groups of physicians have the theoretical or actual ability to control the terms on which they compete. In cases where physicians are the *de facto* decisionmakers of what otherwise seems to be an independent entity, this precedent authorizes piercing the formal structure to find the requisite concerted conduct if physicians are in fact "calling the shots". There is no reason to treat hospitals any differently if they permit their decisions regarding medical staff privileges to be effectively

controlled by an anticompetitive cartel of interested physicians. This analogous line of authority ought to foster the ultimate elimination of the conflict by reasoned analysis rather than direct, and possibly premature, intervention by the Court.

Halifax's assertion that the decision of the court of appeals "threatens the destruction of the peer review process," Petition, p. 19, is both exaggerated and misdirected. This now-familiar refrain overlooks the fact that the ruling in *Weiss* which the Eleventh Circuit adopted (and which Halifax does not challenge) has the potential to achieve virtually the same result. If the individual members of a hospital's medical staff are capable of conspiring among themselves, then the individual participants in the peer review process are subjected to the same risk of antitrust liability regardless of the Eleventh Circuit's ruling and regardless of this Court's acceptance of the case. Moreover, even if they lack the capacity to conspire with their medical staffs, hospitals nevertheless may be found vicariously liable for the anticompetitive conduct of their authorized agents. *See American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982). From a practical standpoint, then, the conflict on which Halifax relies is immaterial. Halifax's exaggerated prediction of future "severe consequences" also disregards a number of existing checks and balances. The dire excesses that Halifax apprehends should be sufficiently curbed by application of the Rule of Reason to intrahospital decisions, legislation such as the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (Supp. 1988), and by Rule 11, Fed.R.Civ.P.

More fundamental, Halifax's policy argument is not a proper basis for seeking certiorari. This argument is the same one that was unsuccessfully advanced in *Patrick v. Burget*, ___ U.S. ___, 108 S.Ct. 1658 (1988) – i.e., the threat of antitrust liability will assuredly deter physicians from participating freely and openly in peer review activities. The Court, however, unequivocally rejected this argument as the basis of its legal decision: "This argument . . . essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch." 108 S.Ct. at 1665. If hospitals believe that the Health Care Quality Improvement Act of 1986 "provides insufficient immunity to protect the peer review process fully, they must take that matter up with Congress." *Id.* at 1665-7 n.8. This Court is the wrong forum for deciding the issues that Halifax attempts to raise in its Petition.

CONCLUSION

Neither issue raised in the Petition merits review by certiorari. Largely because Halifax waived its state action defense during the *en banc* proceedings below, the limited state action analysis in the decision below does not truly conflict with the decision of any other federal court of appeals on the same matter. Regardless, the potential effect of this aspect of the Eleventh Circuit's decision is substantially mitigated by the unique facts and circumstances of the case and intervening federal legislation. The conflict between the lower court's holding on the conspiracy issue and the Third Circuit's treatment of the same matter in *Weiss v. York Hospital* is not substantial

enough to warrant review by the Court at this time. Accordingly, Halifax's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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v.

HALIFAX HOSPITAL MEDICAL CENTER, et al., Defendants-Appellees.

Nos. 84-3256, 84-3603.

United States Court of Appeals, Eleventh Circuit.

May 16, 1989.

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Appeals from the United States District Court for the Middle District of Florida.

Before RONEY, Chief Judge, and TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDOMDSON and COX, Circuit Judges, and TUTTLE*, Senior Circuit Judge.

PER CURIAM:

We granted rehearing *en banc* in this case, *see Bolt v. Halifax Hosp. Medical Center*, 861 F.2d 1233 (11th Cir.1988), to consider whether the appellee hospitals and their medical staffs were exempt from federal antitrust liability under the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as recently interpreted by the Supreme Court in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). A panel of this court had answered this question affirmatively, concluding that Florida's regulatory scheme, which provided for probing judicial review of peer review board decisions regarding medical staff privileges, constituted "active

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* Senior U.S. Circuit Judge Elbert P. Tuttle has elected to participate in further proceedings in this matter pursuant to 28 U.S.C.A. § 46(c).

state supervision" sufficient to invoke *Parker's* state action exemption. *See Bolt v. Halifax Hosp. Medical Center,* 851 F.2d 1273, 1282 (11th Cir.1988).

In oral argument before the *en banc* court, the appellee hospitals and their medical staffs formally withdrew any claim that they were immune from antitrust liability under the state action exemption. Thus, whether or not the defendants are entitled to immunity under *Parker's* state action exemption, they now have clearly waived that immunity in this case. Since we granted rehearing solely to consider this issue, further consideration of the case by the *en banc* court is unnecessary.

The court therefore reinstates the panel opinion, *see Bolt v. Halifax Hosp. Medical Center,* 851 F.2d 1273 (11th Cir.1988), with the exception of the opinion's discussion of the state action exemption, *see id.* at 1279-84, which remains vacated and without precedential value. The case is thus remanded to the panel, which shall reconsider its decision in light of the hospitals' and medical staffs' waiver of immunity and the parties' outstanding petition for rehearing.

IT IS SO ORDERED.